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MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-134

LOWELL F. HOLSAPPLE, a Minor, by His Father and Next Friend, Frank Holsapple,
Respondent,

vs.

RAYMOND D. WOODS, Individually and as Superintendent of the Odin Community Unit School District No. 700; KERMIT K. CUNNINGHAM, Individually and as Principal of Odin High School; THE BOARD OF EDUCATION, Odin Community Unit School District No. 700, County of Marion, State of Illinois, a Body Politic Corporate; PLES WILSON, Individually and as President of the Board of Education; ROBERT UCHITJIL, Individually and as Member of the Board of Education, Odin Unit No. 700; BILL JACKSON, Individually, and as Member of the Board of Education, Odin Unit No. 700; VIRGIL STEELE, Individually, and as Member of the Board of Education, Odin Unit No. 700; JACK BRANCH, Individually and as Member of the Board of Education, Odin Unit No. 700; EARL VAUGHN, Individually and as Member of the Board of Education, Odin Unit No. 700; LAWRENCE HAYDEN, Individually, and as Member of the Board of Education, Odin Unit No. 700,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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No. .....

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Petitioners.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on May 22, 1974.

OPINIONS BELOW

The Order of the District Court for the Eastern District of Illinois is printed in Appendix A hereto and is unreported. The opinion of the Court of Appeals for the Seventh Circuit is printed in Appendix B and is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit, printed in Appendix B hereto, was entered on May 22, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), which is printed in Appendix C.

QUESTIONS PRESENTED

1. Is the freedom to wear one's hair at any desired length a fundamental right guaranteed by the United States Constitution?

2. Should a school regulation be sustained when no fundamental right is involved and when the school presents evidence that a rational relationship exists between the regulation and a valid state interest, the creation and maintenance of a proper learning atmosphere?

3. Should findings of fact, concurred in by two lower Federal courts, be reversed when uncontradicted expert testimony was presented at trial which contradicts the trial court's findings and when the dispute between the parties is not so much over elemental facts as over the legal and Constitutional significance of them?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are the First, Ninth, and Fourteenth Amendments to the United States Constitution. The statutes giving the District Court power to issue the injunction are 42 U.S.C. 1983 and 28 U.S.C. 2201 and 2202, which are printed in Appendix C.

STATEMENT

This suit was brought by the respondent, plaintiff below, Lowell Holsapple, a student at the Odin High School, Odin, Illinois. The petitioners, defendants below, are the members of the Board of Education of Odin High School District No. 700, the Superintendent of the District and the principal of the school. The plaintiff was provided with a copy of the School Board Policy on grooming upon enrollment at the school on August 28, 1973. The pertinent provision of the policy on grooming states: "Excessively long hair to the eyebrows, ears, and to the collar will be cause for dismissal." The plaintiff was suspended on September 17, 1973, for violating the grooming provision. Shortly thereafter, the plaintiff filed a civil rights complaint and a motion for a temporary restraining order against the defendants in the United States District Court for the Eastern District of Illinois; plaintiff requested that a declaratory judgment issue declaring the grooming provision unconstitutional. Both actions were brought pursuant to 42 U.S.C. 1983. On October 9, 1973, a consolidated hearing on motions for preliminary and permanent injunctions was held. At this hearing four experienced educators testified in behalf of the defendants. One, Raymond D. Woods, a defendant herein, testified that there is a direct correlation between dress and grooming and behavior (Trans. 20-23) and that hair length is related to a student's classroom

attitude, discipline and grades (Trans. 24-26). James Doggin, school principal and assistant superintendent of Shawnee Community Unit School District No. 84, testified that the wearing of long hair by students interferes with the learning process (Trans. 46) and that such students create problems related to discipline (Trans. 46-47). A third witness, Gerhardt C. Matzner, a Professor of School Administration at Eastern Illinois University, stated that generally students with long hair continue to cause discipline problems at the college level (Trans. 60-61) and that long hair is generally a symbol of rebellious attitudes and conduct toward school authorities, which the authorities must be permitted to discourage (Trans. 61). The last witness for the defendants was Ruth Westerhold, Chief Psychologist of the three-county Kaskaskia Special Education District in Illinois. She testified that it was discovered in a study of seven area high schools that most students with long hair were in the lowest one-fourth of the class (Trans. 71-73); additionally, she testified that a direct correlation between good grooming and good behavior exists (Trans. 70).

The plaintiff was the only witness in his behalf. He testified that there had been no disruptions in classes due to the length of his hair (Trans. 92). He testified that he wore his hair at a certain length because he likes to; he specifically testified that the length of his hair was not due to any political, racial, or religious belief, nor was it a symbol of any movement or a means of self-expression (Trans. 94-94).

The District Court, ruling in the plaintiff's favor, declared the grooming code to be unconstitutional and enjoined the defendants from disciplining plaintiff for violation of the hair regulation.

On appeal, the Court of Appeals for the Seventh Circuit affirmed. The plaintiff-appellee submitted a motion for affirmance without oral argument pursuant to Circuit Rule 22; the court

granted the motion. In its opinion, the court dealt only briefly with the question of the District Court's findings of fact. Despite the testimony in the record, the court refused to alter either of these findings:

> "18. There is no evidence that length of the plaintiff's hair or the length of any other student's hair has adversely affected the learning experience of Odin High School.
>
> * * * * * * *
>
> "21. There is no evidence that a substantial nexus exists between the length of the plaintiff's hair or the length of any other student's hair, whether long or short, and discipline problems at Odin High School."

The court also denied the defendant's argument that the Odin hair regulation does not infringe the Constitutional rights of the plaintiff; the court held that in a school context the right to wear one's hair at any length or in any desired manner is a fundamental right.

REASONS FOR GRANTING THE WRIT

I

In holding that the respondent had the right, in a school context, to wear his hair at any length or in any desired manner as an ingredient of personal freedom protected by the United States Constitution, the United States Court of Appeals for the Seventh Circuit rendered a decision in conflict with the decisions of other Courts of Appeal on the question of a school district's right to enforce a regulation as to the length at which a male student may wear his hair. Support for both sides of this question can be found in the decisions of the different circuits of the Court of Appeals; and in the Fifth Circuit, one can find a case on each side of the question.

School regulations as to the permissible length and style of hair have been held valid in the Third, Fifth, Sixth, Ninth and Tenth Circuits:

Gere v. Stanley, 453 F. 2d 205 (3rd Cir. 1971);

Ferrell v. Dallas Independent School District, 392 F. 2d 697 (5th Cir. 1968), cert. den. 393 U.S. 856;

Gfell v. Rickelman, 441 F. 2d 444 (6th Cir. 1971);

Freeman v. Flake, 448 F. 2d 258 (10th Cir. 1971), cert. den. 405 U.S. 1032;

King v. Saddleback Junior College District, 445 F. 2d 932 (9th Cir. 1971), cert. den. 404 U.S. 979.

Similar regulations have been held invalid in the First, Fifth, Seventh and Eighth Circuits:

Richards v. Thurston, 424 F. 2d 1281 (1st Cir. 1970);

Dawson v. Hillsborough County, Florida, School Board, 445 F. 2d 308 (5th Cir. 1971);

Breen v. Kahl, 419 F. 2d 1034 (7th Cir. 1969), cert. den. 398 U.S. 937;

Bishop v. Colaw, 450 F. 2d 1069 (8th Cir. 1971).

This Court should grant certiorari to resolve the conflict among the circuits of the United States Courts of Appeals.

II

This Court should grant certiorari to settle the question of whether a student in a school context has the Constitutionally protected right, the fundamental right, to wear his hair at any length or in any desired manner.

Throughout these proceedings the essential contention of the petitioners has been that the respondent did not possess the fundamental right, under the First, Ninth, or Fourteenth Amendments, or any penumbras thereof, to wear his hair in a manner which violated a school board regulation. The respondent alleged that such a fundamental right did exist. The positions of both the petitioners and the respondent have been upheld in a number of the circuits of the Courts of Appeal.

This Court, however, has never directly addressed the point of whether a student has the fundamental right to wear his hair in any manner in a school context. However a number of this Court's opinions have offered guideposts to the lower courts; unfortunately some courts have not seen fit to take the earlier opinions for their true value. This Court could not have been much more explicit than when it noted:

> "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment . . . Our problem involves direct, primary First Amendment rights akin to 'pure speech.'" *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 at 507, 508 (1969).

Therefore, it is clear that the decision in the case at bar is either in conflict with *Tinker* or else the question remains to be answered.

When this Court addressed the propriety of judicial interposition into the public schools, it specifically noted that the courts have applied the First Amendment to the schools to safeguard "the fundamental values of freedom of speech and inquiry and of belief." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). In the above cases this Court has sketched the parameters of the First Amendment; notably without any reference to a fundamental freedom of personal appearance.

The Courts of Appeal in three circuits (First, Seventh, and Eighth) have each decided a case (*Richards v. Thurston, supra; Breen v. Kahl, supra*; and *Bishop v. Colaw, supra*) contrary to the decisions of this Court in that these Courts of Appeal have held the right to wear hair at any length in a school context to be a Constitutionally protected right of the fundamental or basic quality. This Court should grant certiorari in order to settle the question of whether one has the fundamental right to wear one's hair at any desired length; the question needs to be settled, because it has been decided in such a divergent manner in the different circuits.

III

Certiorari should be granted to review the holding of the court below which upheld the trial court's finding of facts. The trial court's findings (please see Statement) that no evidence was presented on the very points upon which experts testified gives rise to a cause for inquiry. This Court will not normally reverse findings of fact concurred in by two lower courts unless clearly erroneous; however, here the dispute is not so much over the basic facts as it is over the Constitutional significance

to be attached to them. This then is clearly analogous to *Neil v. Biggers*, 409 U.S. 188 (1972), though the case at bar fails within the civil realm. In the case at bar the petitioners' expert witnesses' testimony was not questioned; it is only a matter of whether this testimony is sufficient to meet the requirements for evidence to sustain this regulation.

This Court, therefore, should reverse the finding of facts designated numbers 18 and 21 by the trial court, since the dispute is not as to the basic facts, but to the legal and Constitutional significance to be attached to them.

IV

This Court should grant certiorari because the Court of Appeals, by deciding that the respondent had a fundamental right to wear his hair at any length, applied an inappropriate standard, the "substantial justification" test, to the school board's regulation.

The Court of Appeals premised its evaluation of the petitioner's evidence on the holding that the respondent had a "fundamental right" to wear his hair at any length in a school context. Accordingly, the Court of Appeals applied the "substantial justification" test to petitioners' regulation. The effect was to scrutinize the Odin hair regulation to a greater extent than what is normally done; normally a regulation enacted by a unit of local government is subject to the "rational relationship" test.

Where the right which the State has interfered with is not "fundamental" the State bears the burden of justification, but the burden in that case is lesser than if the right were deemed to be "fundamental." Certainly the State must first show that the statute is "legitimate," *McCulloch v. Maryland*, 4 Wheat.

316 (1819); then the State must demonstrate that a rational relationship exists between the statute and the end which it purports to serve. *Goldblatt v. Hempstead*, 364 U.S. 590 (1962); *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957).

In the case at bar the objective of the Odin School hair regulation was the creation and maintenance of a proper learning atmosphere, an entirely legitimate end. Due to the fact that one does not have a "fundamental right" to wear one's hair at any length, the Court of Appeals had only to inquire whether the Odin hair regulation was rationally related to the end of the creation and maintenance of a proper learning atmosphere. This is not to say that the trial court's inquiry should be perfunctory or that the Court of Appeals should affirm on the basis of minimum evidence from the school's witnesses; but in the case at bar sufficient evidence was presented to demonstate that a rational relationship between the regulation and a valid State interest did exist.

At the trial four expert witnesses testified that a direct correlation exists between good grooming and good conduct. Good grooming, by their testimony, included hair worn in a manner to conform to the school's regulation. Good conduct, by their testimony, meant conduct which contributes to and facilitates a good learning atmosphere. The witnesses explained the meanings they attached to terms such as "good conduct," "proper attitude," and "learning atmosphere." The witnesses detailed the types of observations they had made in their experience which led them to their conclusion that a direct correlation between grooming and behavior did exist.

Considering this testimony, and that the respondent offered no contradictory evidence, it seems clear that the trial court and the Court of Appeals would have upheld the Odin hair regulation but for the earlier ruling that a "fundamental right"

was involved. The testimony offered established a rational nexus between the Odin hair regulation and the regulation's purpose of fostering a proper learning atmosphere. Clearly the regulation should have been upheld.

The previous opinions of this Court would support such a result; the general principle applicable is that ". . . the Fourteenth Amendment gives the Federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Dandridge v. Williams*, 397 U.S. 471, 486 (1969).

This Court noted:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . By and large, public education in our Nation is committed to the control of State and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic Constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

This was echoed one year later in *Tinker v. Des Moines Independent Community School District, supra.*

Therefore, this Court should grant certiorari because, due to an erroneous view of what constitutes fundamental rights, the trial court and the Court of Appeals have applied an inappropriate standard—the "substantial justification" test—to this school regulation. By granting certiorari and delivering a decision in accordance with earlier opinions of this Court, school districts, as one of the cornerstones of this nation's local communities, will be accorded the respect under the law of which they are so justly deserving.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted

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APPENDIX

APPENDIX A

In the District Court of the United States
For the Eastern District of Illinois

Lowell F. Holsapple,
Plaintiff,
vs.
Raymond D. Woods, et al.,
Defendants.
Civil No. 73-231-E

Order

(Filed Nov. 1, 1973)

Foreman: Judge:

Plaintiff in this action is a male high school student who has been suspended from school, concededly because his hair length violates the grooming code at Odin High School. The regulation states: "Boys: Excessively long hair to the eyebrows, ears, and to the collar will be cause for dismissal." Plaintiff seeks declaratory and injunctive relief pursuant to 42 U.S.C. § 1983.

In a similar case, this Court noted that public high school hair codes are almost per se unlawful, *Copeland v. Hawkins*, 352 F. Supp. 1022 (E.D., Ill., 1973). As this Circuit has held repeatedly, "the right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution." *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir., 1969); *Crews v. Cloncs*, 432 F.2d 1259 (7th Cir., 1970); *Arnold v. Carpenter*, 459 F.2d 939 (7th Cir., 1972). School authorities must meet a substantial burden to

justify any infringement of this constitutional right of plaintiff. *Id.*

The evidence which Defendants presented in an effort to meet this burden consisted of the testimony of five witnesses, each an expert in school administration or student behavior. They testified that "good grooming" was related to "proper behavior", and that students in academic or disciplinary trouble frequently wore long hair.

The Court finds that this testimony is insufficient to justify the school hair regulation. No effort was made to define "proper behavior" or "good grooming". Indeed, longer hair is now the norm among young men in this country. More fundamentally, Defendants failed to show how long hair could cause academic or discipline problems. The basic premise observed by several of the witnesses was that most students with academic or discipline problems wore long hair. It does not logically follow that most students with long hair are academic or discipline problems, nor that long hair causes these problems. If a student has an attitude of rebellion or non-conformity, presumably long hair is a manifestation or a symptom of that attitude. To the extent that such an attitude leads to actual disciplinary problems, the school authorities have ample power under the law of Illinois to deal with them. None of the witnesses suggested that forcing a student to cut his hair short will cause his grades to improve or his attitude to change. And Defendants have wholly failed to explain what legitimate interest they have in suppressing all expressions of non-conformity among their students, see generally, *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

As this Court said in *Copeland*, supra, it is difficult to conceive of a public high school hair code which would be constitutional. The one presently in effect at Odin High School fares no better.

An additional issue raised at trial was the propriety of the representation of Plaintiff by both private counsel and the Land of Lincoln Legal Assistance Foundation. The parties were in dispute as to whether Land of Lincoln violated its own guidelines in accepting this case. This, of course, has no bearing on the merits of the case, but is of legitimate concern to the bar of this Court. Should the question persist in future cases, the Court may be called upon to pursue it further; or the matter could be referred to the attention of appropriate officials of the bar. Since the issue has been raised here, the Court will ask Land of Lincoln to comply with its own regulations regarding the representation of clients.

Judgment in the above-entitled cause is hereby entered for the PLAINTIFF.

The following shall consist of additional findings of fact and conclusions of law.

1. Plaintiff, Lowell F. Holsapple, is a minor and a citizen of the United States and the State of Illinois. Plaintiff is a student at Odin High School, a free public educational institution. Plaintiff is represented in this lawsuit by his father and next friend.

2. Defendant, Raymond D. Woods, is the superintendent of Odin High School No. 700.

3. Defendant, Kermit K. Cunningham, is the principal at Odin High School.

4. Defendants, Ples Wilson, Robert Uchitjil, Bill Jackson, Virgil Steele, Jack Branch, Earl Vaughn and Lawrence Hayden, are members of the School Board of Odin District No. 700.

5. At all times material to this cause, Defendants acted under color and pretense of law, to-wit, under color of the statutes,

ordinances, regulations, customs and usages of the State of Illinois and its subdivisions.

6. This Court has jurisdiction of this cause pursuant to Title 42 U.S.C. Section 1983 and Title 28 U.S.C. Sections 2201 and 2202.

7. Prior to the commencement of the 1973-74 school term, the Defendant school board members enacted a comprehensive dress code which prohibits boys from wearing hair to the eyebrows, ears, and the collar.

8. Plaintiff enrolled for the fall semester at Odin High School on August 28, 1973 and was given a copy of the School Board Policy on grooming.

9. Defendant Woods informed certain male students at Odin High School whose hair length violated the code, including the Plaintiff, Lowell Holsapple, that they would have until September 17, 1973 to comply with the Code.

10. For at least the past two or three years there was a code governing boy's hair at Odin High School.

11. Defendant Woods phoned the mother of the Plaintiff on Friday, September 14, 1973 and informed her that if he did not have his hair cut by September 17, 1973, he would be suspended from Odin High School for ten days and then there was a possibility he would be expelled for the rest of the school year.

12. Plaintiff, Lowell F. Holsapple, did appear at Odin High School on Monday, September 17, 1973, and was met at the door by Defendant Cunningham and was asked if the Defendant Woods had talked to him. When the Plaintiff acknowledged that he had, Defendant Cunningham told the Plaintiff he was suspended for ten days.

13. Plaintiff was suspended from Odin High School on September 17, 1973.

14. There is substantial probability that the Plaintiff will be subjected to further harassment and punishment, including expulsion, by the Defendants for his failure to comply with the Board's hair regulations.

15. Plaintiff has no plain, adequate, or complete remedy at law.

16. The hair regulation enacted by the Defendants deprives the Plaintiff of the opportunity to wear his hair in the style and in the manner that he and his parents deem proper.

17. There is no evidence that the length of the Plaintiff's hair or the length of any other student's hair has detracted from his academic performance at Odin High School.

18. There is no evidence that length of the Plaintiff's hair or the length of any other student's hair has adversely affected the learning atmosphere or the education process at Odin High School.

19. The school hair regulation enacted by the Defendants applies only to boys and does not attempt to regulate the hair length or hair style of girls.

20. There is no evidence that the general restrictions in the Odin hair regulation are needed for health or safety reasons.

21. There is no evidence that a substantial nexus exists between the length of the Plaintiff's hair, or the length of any other student's hair, whether long or short, and discipline problems at Odin High School.

22. There is no evidence of any actual disturbances at Odin High School due to the length of the Plaintiff's hair, or the length of any other student's hair.

23. There is no evidence that there are any peculiar qualified inherent in long hair on boys which cause any disciplinary or academic problems.

24. The Plaintiff has been and there is a substantial probability that he will be in the future deprived of his rights and privileges guaranteed by the Constitution and laws of the United States and the State of Illinois.

WHEREFORE, IT IS THE ORDER OF THIS COURT, that:

(1) the portion of the Odin High School grooming code relating to boys' hair is declared to be unconstitutional, as violative of the Fourteenth Amendment to the Constitution of the United States;

(2) the Defendants, their successors in office, agents, employees, and persons in active concert with them are permanently enjoined from disciplining Plaintiff for violation of the hair regulations;

(3) any record or mention of the suspension or other disciplinary action taken against Plaintiff shall be expunged from the records of the Odin High School District, and, Plaintiff shall be permitted to make up any school work missed during involuntary absences relating to said disciplinary actions.

Dated: November 1, 1973.

JAMES L. FOREMAN
United States District Judge

APPENDIX B

In the United States Court of Appeals
for the Seventh Circuit

September Term, 1973 April Session, 1974

No. 74-1116
Lowell F. Holsapple, a Minor by his Father and Next Friend,
Plaintiff-Appellee,

v.

Raymond D. Woods, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Illinois.

No. 73-231-E

James L. Foreman
Judge

Decided May 22, 1974

Before Fairchild, Cummings and Pell, Circuit Judges.

Per Curiam. This matter comes before the Court on the filing of the record and briefs of the parties and on the submission by the appellee of a motion for affirmance without oral argument pursuant to Circuit Rule 22. On consideration whereof, we grant the motion and affirm the judgment of the court below.

Plaintiff Lowell F. Holsapple is a male student at Odin High School, Odin, Illinois. On August 28, 1973, he enrolled for the fall semester at the school, at which time he was provided with a copy of the School Board Policy on grooming. The grooming

provision read: "Excessively long hair to the eyebrows, ears, and to the collar will be cause for dismissal." On September 17, 1973, plaintiff was suspended for violation of the grooming provision. He then filed a civil rights complaint and a motion for temporary restraining order in the district court against defendant Superintendent of the Public School and members of the Board of Education, requesting judgment declaring the grooming policy unconstitutional and other relief. Plaintiff remained suspended from school until September 25, 1973, at which time the district court approved a stipulation between the parties that the plaintiff could return to school without altering his hair, pending final hearing on the merits of the case. A consolidated hearing on motions for preliminary and permanent injunctions was held on October 9, 1973, at which four witnesses for the defendants testified.[1] The stipulation referred to *supra* remained in effect until November 1, 1973, when the district court entered judgment declaring the portion of the grooming code relating to boys' hair unconstitutional, as violative of the Fourteenth Amendment. Defendants have appealed, raising two issues.

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[1] At the final hearing, the defendants produced four experienced educators and administrators as witnesses. One, Raymond D. Woods, one of the defendants herein, testified that there is a direct correlation between dress and grooming and behavior (Tr. 20-23) and that hair length is related to a student's classroom attitude, discipline and grades (Tr. 26 and 27). James Doggin then testified that the wearing of long hair by students interferes with the learning process (Tr. 46) and that such students create problems related to discipline (Tr. 46 and 47). Another witness, Gerhardt C. Matzner, a Professor of School Administration at Eastern Illinois University, stated that students with long hair generally continue to cause discipline problems at the college level (Tr. 60-61) and such long hair is generally a symbol of rebellious attitudes and conduct toward school authorities which they must be permitted to discourage (Tr. 61). The final witness for defendants was Ruth Westerhold who is currently Chief Psychologist of the three-county Kaskaskia Special Education District in Illinois. She testified that in a study of seven area high schools, students with long hair were, with one exception, all in the lower three-fourths, and most were in the lowest one-fourth, of the class (Tr. 71-73) and that there is a direct correlation between good grooming and good behavior (Tr. 70). All witnesses were subjected to cross-examination by plaintiff's counsel.

I

Defendants first contend that the district court erred in holding that no evidence was presented at trial that showed a direct correlation between students' hair length and the creation and maintenance of a proper learning atmosphere. They point to certain excerpts from testimony of the four expert witnesses to show that evidence was in fact presented to show a correlation between dress and grooming on the one hand and behavior on the other; and that length of hair is part of this good grooming-good behavior nexus. They argue that the existence of such testimony refutes, as erroneous, the following two findings of fact and conclusions of law of the trial court:

> "18. There is no evidence that length of the Plaintiff's hair or the length of any other student's hair has adversely affected the learning experience of Odin High School.
>
> * * * * * * *
>
> "21. There is no evidence that a substantial nexus exists between the length of the Plaintiff's hair or the length of any other student's hair, whether long or short, and discipline problems at Odin High School."

We find this contention to be without merit.

As the court in *Franks v. National Dairy Products Corp.*, 414 F.2d 682, 685 (5th Cir. 1969), stated:

> "It is not our task to re-try the facts of the case; this is especially true where the lower court's findings are based on oral testimony and the trial judge has viewed the demeanor and judged the credibility of the witnesses . . . The trial court was not bound to accept the opinion of the expert witness but, rather, had a right to use his own common sense and experience and to draw all reasonable inferences from the physical facts and occurrences."

Furthermore, findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. F.R.C.P. 52(a); *see Lichter v. Goss*, 232 F.2d 715, 719 (7th Cir. 1956).

In the instant case, the district judge in the main body of his opinion and order, stated as follows:

> ". . . School authorities must meet a substantial burden to justify any infringement of this constitutional right of the plaintiff.
>
> * * * * * * * *
>
> ". . . They [the expert witnesses] testified that 'good grooming' was related to 'proper behavior,' and that students in academic or disciplinary trouble frequently wore long hair.
>
> "The court finds that this testimony is *insufficient* to justify the school hair regulation. No effort was made to define 'proper behavior' or 'good grooming.' . . . *More fundamentally, defendants failed to show how long hair could cause academic or discipline problems.*" (Emphasis supplied).

Mindful of the district judge's opportunity to judge the demeanor and credibility of witnesses, and after reviewing the transcript of proceedings and the two findings complained of in light of the district judge's opinion— part of which is set out *supra*, we conclude that the district judge's findings are not clearly erroneous so as to require setting them aside.

II

Defendants next contend that the hair regulation does not infringe the constitutional rights of the plaintiff. We disagree.

The law of this Circuit is well settled that in a school context, the right to wear one's hair at any length or in any desired man-

ner is an ingredient of personal freedom protected by the United States Constitution.[2] *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969); *Crews v. Cloncs*, 432 F.2d 1259 (7th Cir. 1970); *Arnold v. Carpenter*, 459 F.2d 939 (7th Cir. 1970). To limit or curtail this or any other fundamental rights, the state has a "substantial burden of justification." *Breen, supra* at 1036. "Substantial justification" has been defined by the United States Supreme Court as follows:

> "* * * [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

An examination of the record and transcripts in this case reveals, simply, that the defendants failed to meet this substantial burden of justification. Defendants have fallen far short of showing that poor discipline and lower grades are caused by hair length in violation of the school standard and are "so aggra-

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[2] "[S]tate-operated schools may not be enclaves of totalitarianism. * * * [Students] are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969). Compare our recent decision in *Max Miller v. School District Number 167, Cook County, Illinois, et al.*, (7th Cir. Slip. op. No. 73-1359, Decided April 5, 1974). In *Miller* we held that "even if the individual interest in one's [there a teacher's] appearance may be characterized as an interest in liberty, the denial of *public employment* because the employer considers the applicant's appearance inappropriate for the position in question, does not in and of itself represent a deprivation that is forbidden by the Due Process Clause." *Id.* at p. 16, emphasis supplied. Our decision in *Miller* did not dislodge our former holdings in *Breen, Crews*, and *Arnold, supra*, in text. "The unavailability of a teaching position in one School District is less serious . . . than the deprivation of an opportunity to obtain an education." *Miller, supra* at p. 11.

vated, so frequent, so general, and so persistent that this invasion of student's individual freedom by the state is warranted." *Breen, supra* at 1036, 1037.

Accordingly, the judgment of the district court is

Affirmed.

Pell, Circuit Judge, concurring: I join in this order solely because it restates well-established authority in this Circuit. Despite the fact that opposing views have been held in the federal courts on the high school-hair issue, the Supreme Court has apparently not deemed the issue to be of sufficient constitutional significance to grant certiorari. I entertain the opinion that the federal courts of this Circuit, including this Court, might have been well advised to have reached the same result, but they have not.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-

one years of age, and citizens of the United States, or in any way abridged except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. 2201

Creation of remedy. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court

of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. 2202

Further relief. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. 1983

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

OCTOBER TERM, 1974
No. 74-134

SEP 16 1974
MICHAEL RODAK, JR., CLE

LOWELL F. HOLSAPPLE, a Minor, by His Father and Next Friend,
Frank Holsapple,
Respondent,

vs.

RAYMOND D. WOODS, Individually and as Superintendent of the Odin Community Unit School District No. 700; KERMIT K. CUNNINGHAM, Individually and as Principal of Odin High School; THE BOARD OF EDUCATION, Odin Community Unit School District No. 700, County of Marion, State of Illinois, a Body Politic Corporate; PLES WILSON, Individually and as President of the Board of Education; ROBERT UCHITJIL, Individually and as Member of the Board of Education, Odin Unit No. 700; BILL JACKSON, Individually, and as Member of the Board of Education, Odin Unit No. 700; VIRGIL STEELE, Individually, and as Member of the Board of Education, Odin Unit No. 700; JACK BRANCH, Individually and as Member of the Board of Education, Odin Unit No. 700; EARL VAUGHN, Individually and as Member of the Board of Education, Odin Unit No. 700; LAWRENCE HAYDEN, Individually, and as Member of the Board of Education, Odin Unit No. 700,
Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the Seventh Circuit

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LIST OF CASES CITED

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Willingham v. Macon Telegraph Publishing Co., 482 F. 2d 535 (5th Cir. 1973) p.7,8

STATEMENT

Respondent accepts petitioners' Statement subject to the following qualifications and additions:

Respondent was a senior at Odin High School when this suit was filed. Pursuant to a stipulation approved by the District Court on September 25, 1973, respondent was re-admitted to Odin High School and has since graduated.

Petitioner Woods admitted on cross-examination that students could conform to the grooming rule by either cutting their hair or wearing it in a fashion that complied with the rule, i.e., not over eyebrows or ears or to the collar. (Tr. 30-31).

The study made by Ruth Westerhold was, according to her own testimony, an "informal survey." (Tr. 71). This survey consisted of going through the yearbooks of seven area high schools and picking the four male students with the longest hair on the days the pictures

were taken. One of these twenty-eight men was third in his class of 110 and the rest ranked in the lower three-quarters of their class. (Tr. 71-73).

No evidence was presented by petitioners' witnesses as to how long hair itself caused discipline problems and/or adversely affected the educational process at Odin High School. District Court's findings of fact 17, 18, 20-23. (Petitioners' Brief at A-5)

REASONS FOR DENYING THE WRIT

I. MOOTNESS

The first reason for denying the writ is that this litigation is now moot. As this Court recently re-stated in DeFunis v. Odegaard, ___ U.S. ___, ___, 42 U.S.L.W. 4578, 4578-79 (Apr. 23, 1974):

> The starting point for analysis is the familiar proposition "that the federal courts are without power to decide questions that cannot affect the rights of the litigants before them." ... The inability of the federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends on the existence of a case or controversy." ... [T]he fact remains that under Art. III "[e]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction."

As in DeFunis, the plaintiff below did not cast his suit as a class action. He sought only individual relief, which was granted, and has since graduated from high school. Therefore, any decision by this Court will be irrelevant in this dispute between

petitioners (hereinafter referred to as the School Authorities), and respondent. See also Van Hoose v. Eidson, 450 F. 2d 746 (6th Cir. 1971).

II. PETITIONERS' "CONFLICTS" ARE DISTINGUISHABLE

The School Authorities also state that there is a conflict between the circuits and cite several cases in which hair-length regulations have been upheld. These cases are distinguishable. Less than four months after the Third Circuit found that it was not "faced squarely with the underlying constitutional issue," Gere v. Stanley, 453 F. 2d 205, 209 n. 8 (3rd Cir. 1971), that court held:

> that the governance of the length and style of one's hair is implicit in the liberty assurance of the Due Process Clause of the Fourteenth Amendment.

Stull v. School Bd. of the Western Beaver Jr.-Sr. High School, 459 F. 2d 339, 347 (3d Cir. 1972). The Fifth Circuit, in Ferrell v. Dallas Indep.

School Dist., 392 F. 2d 697 (5th Cir.), cert. denied, 393 U.S. 856 (1968), assumed "that a hair style is a constitutionally protected mode of expression," Ferrell at 702, but found that there was a compelling state interest "in maintaining an effective and efficient school system," Ferrell at 703. In Gfell v. Rickelman, 441 F. 2d 444 (6th Cir. 1971) the district court had found a reasonable basis for the regulation which the court of appeals found supported by the evidence. Gfell at 446-47. In the instant case, however, both the district court and the court of appeals below found no state interest in the length of hair. Petitioners' Brief at A-2, A-5, A-9. In King v. Saddleback Jr. College Dist., 445 F. 2d 932 (9th Cir.), cert. denied, 404 U.S. 979 (1971), the school authorities submitted affidavits in which the school official-affiants expressed their opinions that hair length interferes with the educational process. King at 939. The trial court below

heard testimony of like effect, but found it unconvincing. District Court's findings of fact 17, 18, 20-23; Petitioners' Brief at A-5. The final case cited by the School Authorities never reached the validity of the regulations because it held that the complaints failed to state a cause of action. Freeman v. Flake, 448 F. 2d 258, 262 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972).

III. TREND TOWARDS ALLOWING PERSONAL CHOICE

In all, nine courts of appeals have considered whether school authorities may constitutionally regulate the length of hair. Five circuits, the First, Third, Fourth, Seventh and Eighth, have found that high school students have a constitutional right to choose their own hair styles while four circuits, the Fifth, Sixth, Ninth and Tenth, have held they do not. Of the remaining two circuits, one has followed the majority's reasoning in finding that police officers also have a right to choose their own

hair styles. Dwen v. Barry, 483 F. 2d 1126 (2d Cir. 1973). It is not clear whether the circuits in the minority will continue to abide by their previous positions. This is especially true in the Fifth Circuit which, in two en banc decisions has held that college students have a constitutionally protected right to wear long hair while high school students do not. Compare Lansdale v. Tyler Jr. College, 470 F. 2d 659 (5th Cir. 1972), cert. denied, 411 U.S. 986 (1973) with Karr v. Schmidt, 460 F. 2d 609 (5th Cir.), cert. denied, 409 U.S. 989 (1972). In addition, one panel in that circuit has found that private employers may not discriminate against long haired men. Willingham v. Macon Telegraph Publishing Co., 482 F. 2d 535 (5th Cir. 1973).

The legal battle against hair length regulation no longer focuses on the school house. The more recent cases focus on governmental regulation of adult hair styles, see, e.g., Rinehart v. Brewer, 491 F. 2d 705 (8th

Cir. 1974) (prisoners); Dwen v. Barry, 483 F. 2d 1126 (2d Cir. 1973) (policemen); Friedman v. Froehlke, 470 F. 2d 1351 (1st Cir. 1972) (national guardsmen), and private employment practices, compare Willingham v. Macon Telegraph Publishing Co., 482 F. 2d 535 (5th Cir. 1973) with Fagan v. National Cash Register Co., 481 F. 2d 1115 (D.C. Cir. 1973).

IV. CONSISTENT WITH TINKER

The School Authorities also suggest that both lower courts misconstrued this Court's decision in Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). But as the passage they quote states, Petitioners' Brief at 7-8, that case concerned the suppression of a political protest by school authorities. Furthermore, they have ignored a pertinent portion of that opinion:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under

> our Constitution. They are possessed of fundamental rights which State must respect, just as they themselves must respect their obligations to the State.

Tinker at 511. See also Breen v. Kahl, 419 F. 2d 1034, 1036 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970).

V. THE RIGHT OF PERSONAL PRIVACY

Unlike a regulation governing the dress of students, a hair length regulation operates twenty-four hours a day, seven days a week, for most of the year. Because it is not possible to accomodate the desires of both the school and the student, one must give way. On pain of forfeiting his free public education, the student is forced to comply with a school regulation when school is not in session. This interference with personal liberty has been held to violate the protections of the Ninth Amendment, Bishop v. Colaw, 450 F. 2d 1069, 1075 (8th Cir. 1971), the Equal Protection Clause of the Fourteenth Amendment, Sherling v.

Townley, 464 F. 2d 587, 588-89 (5th Cir. 1972) (Senior Judge Tuttle specially concurring) (classification based on length of hair); Crews v. Cloncs, 432 F. 2d 1259, 1266 (7th Cir. 1970) (classification based on sex), the Due Process Clause of the Fourteenth Amendment, Richards v. Thurston, 424 F. 2d 1281, 1284-85 (1st Cir. 1970), and somewhere within the penumbra of the First or Ninth Amendments, Breen v. Kahl, 419 F. 2d 1034, 1036 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970). These decisions are consistent with this Court's recognition that the right of personal privacy has many bases. Roe v. Wade, 410 U.S. 113, 152-53 (1973).

While this Court has admonished the Bar on numerous occasions that a denial of a petition for writ of certiorari is not to be taken as an expression on the merits, this Court has had nine opportunities in the last six years to consider the constitutional questions presented by the School Authorities. This Court has found each petition to be not worthy of the grant of certiorari

without regard to which side filed the petition. New Rider v. Board of Educ. of Indep. School Dist. No. 1, 480 F. 2d 693 (10th Cir.), cert. denied, 414 U.S. 1097 (1973); Lansdale v. Tyler Jr. College, 470 F. 2d 659 (5th Cir. 1972) (en banc), cert. denied, 411 U.S. 986 (1973); Karr v. Schmidt, 460 F. 2d 609 (5th Cir.) (en banc), cert. denied, 409 U.S. 989 (1972); Freeman v. Flake, 448 F. 2d 258 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972); King v. Saddleback Jr. College Dist., 445 F. 2d 932 (9th Cir. 1970), cert. denied, 404 U.S. 979 (1971); Stevenson v. Board of Educ. of Wheeler County, 426 F. 2d 1154 (5th Cir.), cert. denied, 400 U.S. 957 (1970); Jackson v. Dorrier, 424 F. 2d 213 (6th Cir.), cert. denied, 400 U.S. 850 (1970); Breen v. Kahl, 419 F. 2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970); Ferrell v. Dallas Indep. School Dist., 392 F. 2d 697 (5th Cir.), cert. denied, 393 U.S. 856 (1968).

VI. PETITIONERS FAIL TO SATISFY THE BURDEN OF PROOF TEST THEY PROPOSE

Even if the School Authorities were to prevail on the constitutional question they present, both the trial court and the court of appeals below have found no evidence to support the regulation. Petitioners' Brief at A-2, A-9 to A-10. Thus they could not meet the rational relationship test they propose. Petitioners' Brief at 9-10. This is demonstrated by Petitioner Woods testimony that long haired men could comply with the regulation by styling their hair so that it did not cover the eyebrows, ears or collar. It strains credibility to contend that an undisciplined long haired student can be transformed into a model student by combing his hair out of his eyes. As the trial court below stated:

> More fundamentally, Defendants failed to show how long hair could cause academic or discipline problems. The basic premise observed by several of the witnesses was that most students with academic or discipline problems wore long hair. It does not logically follow that most students with long

> hair are academic or discipline problems, nor that long hair causes these problems. ... None of the witnesses suggested that forcing a student to cut his hair short will cause his grades to improve or his attitude to change.

Petitioners' Brief at A-2. This was reiterated by the court in its findings fact 17, 18, 20-23. Petitioners' Brief at A-5. The court of appeals below found the School Authorities' challenge to these findings "to be without merit." Petitioners' Brief at A-9.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served on each adverse party this 16th day of September, 1974 by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record as follows: Glenn E. Moore, 1007 Broadway, Mt. Vernon, Illinois 62864, Counsel for Petitioners.

John C. O'Brien

JOHN C. O'BRIEN